SUPREME COURT, U.S.
FILED
JUL 12 1994
OFFICE OF THE CLERK

No. 93-6892

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MATTHEW WAYNE TOME,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Petitioner's opening brief demonstrated that the plain meaning, common law antecedents, and legislative history of Fed. R. Evid. 801(d)(1)(B) show conclusively that the Rule incorporates the common law "prior-in-time" or "pre-motive rule." That rule states that where a charge of recent fabrication or improper motive is made, proof of a prior consistent statement is admissible only where such statement was made prior to the factual circumstances giving rise to the charged improper motive and thereby, by the very fact of its making, serves to *rebut* the charge.

The government *admits* that the pre-motive rule was the "*majority rule*" at the time of adoption of the Federal Rules. Resp. Br. 15, 33 (emphasis added). In fact, the pre-motive rule was the "universal rule." M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*, 75 A.L.R.2d 909, 920 (1961). Moreover, the very terms used in Rule 801(d)(1)(B)—"rebut" and "recent fabrication"—are terms of art drawn from the common law pre-motive rule. *See, e.g., id.* (where witness is "*charged* with . . . influence of [improper] *motive* . . . declarations at a time when motive did not exist . . . show that the testimony was not an afterthought and *rebut* the theory of *fabrication*") (emphasis added); Resp. Br. 27 ("charge of recent fabrication" is charge that witness "made it all up" for purposes of trial and is rebutted by showing that "at an earlier time" witness told same story).

Despite the common law antecedents of the Rule's terms and principles, the government contends that Congress intended the Rule to take a new direction—to permit admission of any prior consistent statement having relevance to "witnesses' credibility." Resp. Br. 19. The government's interpretation is fundamentally flawed. Rule 801(d)(1)(B) speaks in terms of rebuttal evidence, not relevance. Moreover, there is no indication in the Advisory Committee notes or legislative history that Rule 801(d)(1)(B) was intended to depart from the common law

and embody the new direction espoused by the government. "Absent contrary indications, we can presume that Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law." *Williamson* v. *United States*, 62 U.S.L.W. 4639, 4645 (U.S., June 27, 1994) (Kennedy, J., concurring, joined by Rehnquist, C.J., Thomas, J.); *see United States* v. *Abel*, 469 U.S. 45, 52 (1984) (holding that the body of common law knowledge continues to exist as a source of guidance). In fact, the legislative history *undermines* the government's interpretation. The Advisory Committee and Congress intended to enact a "system of class exceptions" drawn from the common law and *rejected* the view that "[a]dmissibility would be determined by weighing the probative force of the evidence . . . ." Advisory Committee Note to Article VIII, Introductory Note: The Hearsay Problem, 28 U.S.C. App., at 771. In sum, the legislative history as well as the plain meaning, common law terms of art, and common law antecedents of Rule 801(d)(1)(B) support petitioner's and not the government's reading of the Rule.

ARGUMENT

I. THE PLAIN MEANING, TERMS OF ART, COMMON LAW ANTECEDENTS, AND LEGISLATIVE HISTORY OF RULE 801(d)(1)(B) SHOW CONCLUSIVELY THAT THE RULE INCORPORATES THE COMMON LAW "PRIOR IN TIME" OR "PRE-MOTIVE" RULE.

A. The Government's Interpretation Is Contrary To The Plain Meaning Of The Rule's Terms And Also To The Established Meaning Those Terms Enjoyed In Common Law.

1. The government seeks to avoid the plain meaning of the words "offered to rebut an express or implied charge against the declarant of recent fabrication . . . ." Fed. R. Evid. 801(d)(1)(B). The government's first position is that the phrase "offered to rebut" is essentially meaningless and provides no direction as to any preliminary finding a trial judge must make concerning the relationship between the prior consistent statement and the charge of improper motive: "the Rule requires only that the statement be '*offered* to rebut' the charge, not that the statement, in fact, 'rebut' the charge." Resp. Br. 18. A party's claim that a statement is "offered to rebut" is false if the statement has no probative value to rebut; the statement then is actually offered for some other purpose, such as to bolster the witness's credibility. The more natural reading of "offered to rebut" is that a judge preliminarily find that, if believed by the jury, the witness's claim that declarant actually made the prior statement would rebut the charge of improper motive.

The government then retreats to its basic argument that Rule 801(d)(1)(B) "gives the parties leeway to introduce evidence that *tends to rebut* a charge of fabrication." *Id.* (emphasis added). The government's view is that prior consistent statements may be admitted if, "in light of all the evidence," they bear on an *ultimate* determination of the "witnesses' credibility." Resp. Br. 18-19.

The Rule's text does not support the government's interpretation; it says "rebut," not "tends to rebut," [1] and refers to statements rebutting the "charge" of improper motive, rather than to statements relevant to an ultimate determination of declarant's credibility. The government's interpretation would transform the Rule to read: "Upon a charge of recent fabrication or improper influence or mo-

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[1] Indeed, the government's interpretation of "rebut" is at odds with common definitions of the term. The government *admits*, Resp. Br. 22, that "rebut" is defined thusly: "to contradict, meet, or oppose by formal legal argument, plea or countervailing proof," "to expose the falsity of," and "to make or put in an answer or counter proof." *Id.* quoting *Webster's Third New International Dictionary* 1893 (1986). Introduction of a prior consistent statement subject to the same improper motive charged, as occurred in this case, which statement may, in conjunction with all other evidence in the case, make the fact finder view the witness's truthfulness as more likely, does not "contradict" or even "meet" the charge of improper motive; it does not "oppose by formal legal argument, plea or countervailing proof," or "expose the falsity of" the charge of improper motive.

tive, all prior consistent statements of declarant relevant to declarant's credibility are admissible nonhearsay."[2]

The government also peppers its argument concerning the meaning of "rebut" with completely baseless claims that petitioner's position would require a judge to "encroach on the jury's domain of evaluating the credibility of witnesses," Resp. Br. 19, and to "decide whether each statement, by itself, would completely defeat the charge of improper motive . . . ." Resp. Br. 22; *see also* Resp. Br. 28. In fact, the common law rule requires only that the judge determine whether the prior consistent statement preceded or post-dated the period when the charged improper motive existed. The judge thereby admits only testimony about those hearsay statements that, if believed by the jury, would rebut the charge of improper motive. By contrast, it is the government's and Tenth Circuit's rule which requires the judge to determine the "probative weight" of the prior consistent statement with respect to declarant's credibility at the time of making the statement. *See* J.A. 36-37 (analyzing trustworthiness of A.T.'s prior consistent statements).

2. The government offers no adequate explanation for the temporal reference in the Rule to charges of "*recent* fabrication or improper influence or motive." The government admits that "a charge of recent fabrication involves an allegation that 'the witness has made it all up' to meet the exingencies of the case." Resp. Br. 27, quoting 4 D. Louisell & C. Mueller, *Federal Evidence* § 420, at 188 (1980). Further, the government acknowledges that "[i]n response to a charge of recent fabrication, the *purpose* of the prior consistent statement is to show that,

[2] The Solicitor General states that this Court's own "practice" with respect to "rebuttal argument" indicates that rebuttal evidence need not meet or contradict the charge against which it is offered. Resp. Br. 22. But clearly, the purpose of rebuttal argument is to make points which, if accepted by this Court, would rebut respondent's arguments and result in petitioner's prevailing on the merits. It would waste the Court's time for a petitioner to use rebuttal to make arguments that, even if accepted by the Court, would not rebut respondent's claims.

at an earlier time, 'the witness did speak and tell the same story.'" Resp. Br. 27 (emphasis added), quoting 4 J. Wigmore, *Evidence*, § 1129, at 271 (Chadbourn rev. ed. 1972). The government therefore concedes that a charge of recent fabrication is rebutted by introducing a prior consistent statement from "an earlier time," that is, from a time when the motive to fabricate did not exist. Likewise, charges of improper motive, bias, or influence have been rebutted for more than a century by the introduction of prior consistent statements from "an earlier time" than the more recent motive, bias or influence.

Because charges of improper motive, bias or influence are disproved in the same manner as charges of recent fabrication, *i.e.*, by introduction of prior consistent statements from "an earlier time," they have been analyzed together by commentators and treatises. *See* 4 Louisell & Mueller, *supra*, § 420, at 193 (discussing "charge of fabrication, influence, or motive"); 1 *McCormick on Evidence* § 47, at 177 (4th Ed. J.W. Strong 1992) (similar); Annotation, *supra*, 75 A.L.R.2d at 935-46 (analyzing "Impeachment on ground of bias, interest, recent fabrication, or motive to falsify").[3] Accordingly, a common sense reading of Rule 801(d)(1)(B) is that the terms "recent fabrication or improper influence or motive" are placed together because they are commonly rebutted in the same manner. The temporal element embodied in the word "recent" and the term "recent fabrication," and the manner of disproving a "recent fabrication," apply to charges of influence and motive as well.

3. Finally, any valid analysis of the language of Rule 801(d)(1)(B) must account for the fact that the Rule employs terms of art, imported wholesale from the common law. *See, e.g., Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836) ("where testimony is assailed as a

[3] *See* M. Graham, *Federal Practice & Procedure* § 6512, at 463-64 (1992) ("[A] charge of improper motive capable of being rebutted by introduction of a prior consistent statement must also be a charge of recent fabrication . . ."). A charge of improper motive implies that the motive caused the witness to distort or alter his or her testimony.

fabrication of *recent* date . . . in order to *repel* such imputation, proof of the antecedent declaration of the party may be admitted"); Resp. Br. 27 (discussing meaning of "recent fabrication"). The term "rebut" is itself, in this context, a common law term of art meaning to disprove by proof of a pre-motive consistent statement.[4] The plain language of Rule 801(d)(1)(B) illustrates the great extent to which "Congress legislated against the common law background" in enacting this Rule. *Williamson*, 62 U.S.L.W. at 4645 (Kennedy, J., concurring, joined by Rehnquist, C.J., Thomas, J.). The government fails to adequately explain why such language should be given a different meaning than it had at common law.

B. The Government Relies On Inapposite Case Law Pertaining To The Admission Of Prior Inconsistent Statements, Rather Than To The Rebuttal Of Charges Of Fabrication, Motive, Or Bias, In A Misguided Attempt To Cloud The Clarity And Near Universal Acceptance Of The Pre-Motive Rule.

Struggling to avoid the inevitable conclusion that Congress, by adopting in Rule 801(d)(1)(B) the precise wording of the majority common law rule, intended to

[4] *See, e.g.*, M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*, 140 A.L.R. 21, 185 (1942) (where witness is attacked tending to show "that testimony is a fabrication of recent date, or is colored, distorted, and falsified through the influence of some strong personal motive . . . witness may be corroborated by *rebutting evidence* of his statements consonant in substance with his testimony, made on occasions . . . anterior to the existence of the compromising bias alleged to impair his credibility") (emphasis added); Annotation, *supra*, 75 A.L.R.2d at 920 (where witness is "charged with . . . influence of [improper] motive . . . declarations at a time when motive did not exist . . . show that the testimony was not an afterthought and *rebut* the theory of fabrication") (emphasis added); *People* v. *Clark*, 288 N.E.2d 363, 371 (Ill. 1972) ("to *rebut* a *charge* or an *inference* that the witness is motivated to testify falsely or that his testimony is of *recent fabrication*, evidence is admissible that he told the same story before the motive came into existence or before the time of the alleged fabrication") (emphasis added).

adopt the pre-motive principle, the government asserts that (1) the "common law rule was never so absolute as petitioner suggests . . . many courts viewed the question of prior consistent statements as one of relevancy," Resp. Br. 33, and (2) some commentators and courts had criticized the common law rule prior to adoption of the Federal Rules of Evidence. *Id.* These arguments are without merit.

1. When the Federal Rules were adopted in 1975, the pre-motive rule had been expressly adopted by an overwhelming majority of state and federal courts.[5] Moreover, the rule frequently used virtually the identical words adopted by Congress in Rule 801(d)(1)(B).[6] As the government admits, the pre-motive rule had been the established common law rule *for over a century* at the time of adoption of the Federal Rules.[7]

In light of the above, to support its claims that the common law rule "was never so absolute as petitioner suggests" and "many courts viewed the question of prior consistent statements as one of relevancy," Resp. Br. 33, the government relies on an inapposite line of cases concerning the admission of prior consistent statements to counter the admission of prior *inconsistent* statements, *not* to rebut a charge of recent fabrication or improper motive. Considerable disagreement existed at common law about the former, but not about the latter. *See* E.

[5] *See, e.g.*, Annotation, *supra*, 75 A.L.R.2d at 920 (concluding that pre-motive rule is the "universal rule"); *id.* at 937-940 (listing states); Annotation, *supra*, 140 A.L.R. at 80-85, 93-99 (listing cases).

[6] *See, e.g.*, *Ellicott*, 35 U.S. at 439; *Lyon* v. *Oliver*, 147 N.E. 251, 255 (Ill. 1925) ("[a]s a general rule, proof of statements made by a witness out of court harmonizing with his theory is inadmissible, but where it is *charged* that his story is a *recent fabrication*, or that he had some *motive* for testifying falsely, *proof* that he gave a similar account of the transaction when the motive did not exist or before the effect of the account could be foreseen is admissible").

[7] Resp. Br. 39 ("petitioner is correct that the majority rule, as developed in the latter half of the nineteenth century" was the pre-motive rule).

Thomas, *Rehabilitating the Impeached Witness With Consistent Statements*, 32 Mo. L. Rev. 472, 482 (1968) ("some of the rules in the inconsistent statements area have been both unsettled and subject to criticism while the bias and recent fabrication rules have been generally accepted in most jurisdictions"); 4 Wigmore, *supra*, § 1126, at 258 ("[t]he field in which judicial divergence of views is most vigorous and the opposing reason most plausible is that of impeachment by prior inconsistent statements"). Compare 1 *McCormick on Evidence, supra*, § 47, at 177 ("if the attacker has charged bias . . . the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless . . . made *before* the source of the bias") with *id.* at 178 ("[t]here is much division of opinion on the question whether impeachment by inconsistent statements opens the door to support by proving consistent statements").

Impeachment by inconsistent statement may or may not be accompanied by a charge of contrivance or improper influence or motive. If there has been no such charge, the timing of the consistent statement may be insignificant. For example, after impeachment by an inconsistent statement, a prior consistent statement should be admissible to support a declarant's *denial* or *explanation* of the inconsistent statement regardless of whether the consistent statement was made before or after the inconsistent statement. *See* M. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 Hastings L.J. 575, 604 (1979) (hereinafter Graham); 1 *McCormick on Evidence, supra*, § 47, at 178 ("If the attacked witness *denies* the making of the inconsistent statement then some courts consider that the evidence of consistent statements near the time of the alleged *inconsistent* one, is relevant to fortify his denial") (emphasis added).

The government relies on analysis concerning prior inconsistent statements in three cases [8] to suggest that the

[8] *See* Resp. Br. 33-39, discussing *Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) 412 (1836); *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480 (1850); *Stewart* v. *People*, 23 Mich. 63 (1871).

common law rule applicable to charges of recent fabrication or improper motive has been in flux and incorporates tests of "relevancy" or "weight and credibility." Resp. Br. 33, 39. These cases do not support this theory, and one flatly contradicts it.

In *Ellicott*, 35 U.S. at 438, the deposition testimony of one Kincaid was impeached through admission of prior inconsistent statements. This Court upheld the lower court's exclusion of proffered testimony of other witnesses of prior statements by Kincaid consistent with his deposition. While the holding in *Ellicott* may suggest that the common law on admission of prior consistent statements to *explain* prior *inconsistent statements* was in a state of transition and may have involved considerations regarding the "weight" of the evidence, that holding does not apply to the common law rule regarding recent fabrication. On the contrary, the Court in *Ellicott* indicated that its reasoning with respect to prior consistent statements offered to counter inconsistent statements was not applicable "where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." *Id.* at 439. *Ellicott* thus reveals that as early as 1836, the common law rule with respect to charges of recent fabrication was established, and contained the "prior in time" or "pre-motive" rule. Moreover, the very terms used by the Court—"fabrication of recent date" and "in order to repel such imputation"—are similar to the terms "recent fabrication" and "offered to rebut" in Rule 801(d)(1)(B).

Similarly, the issue in *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480 (1850), was whether an unsworn statement and an affidavit of an engineer, stating that he had constructed a mill properly, should be admissible to counter prior inconsistent statements, made by the engineer shortly after an accident at the mill, that had been admitted to impeach the engineer's testimony given in the form of interrogatories. This Court held that the state-

ment and affidavit should be excluded because they arose subsequent to the prior inconsistent statements, may have been made "for the very purpose of counteracting" those inconsistent statements, and thus lacked "force and credibility." *Id.* at 492. *Conrad*'s holding involved admissibility of prior consistent statements to explain prior inconsistent statements, not to rebut a charge of fabrication or improper motive.

In *Stewart* v. *People*, 23 Mich. 63 (1871), the court correctly concluded that a prior consistent statement was properly admitted to support the declarant's *denial* of making the inconsistent statement attributed to him. The court found that the pattern of consistency tended to show that the witness never made the inconsistent statement. *Id.* at 75-76. The *Stewart* case does not aid the government; the timing of the prior consistent statement in that case was not even discussed.[9]

In sum, the government's reliance on analysis pertaining to the admissibility of prior consistent statements to counter the admission of prior inconsistent statements sheds no light on the separate common law rule respecting charges of recent fabrication or improper motive. The contours of the latter rule were firmly established for at least a century before adoption of Rule 801 (d)(1)(B). They encompassed a preliminary factual finding that the prior consistent statement arose prior to the facts relied upon to show improper motive; they did not include credibility, weight or relevancy determinations, which would arise only *after* the prior consistent statement satisfied the common law pre-motive rule.

[9] A prior consistent statement in a case such as *Stewart* would be admissible under Fed. R. Evid. 613(b), which provides, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same . . ." *See* M. Graham, *Federal Practice and Procedure, supra*, § 6712, at 461: "A prior statement that corroborates the witness may be admitted without reference to Rule 801(d)(1)(B), if it . . . is otherwise related to or supportive of a denial or explanation offered in response to impeachment of a witness by an alleged self-contradiction, whether an inconsistent statement or a failure to speak when natural to do so, Rule 613."

2. In an equally unavailing effort to obscure the clarity of the common law rule, the government and amici note that beginning in the 1940's, some commentators criticized the common law's general hostility to and exclusion of both prior consistent and prior inconsistent statements of witnesses. Such commentators argued that *all* prior statements of witnesses should be admissible, as the declarant was available and could be cross-examined regarding the out-of-court statements. Resp. Br. 40-41; States' ("St.") Amicus Br. 11. Model codes of evidence reflecting this view were also propounded. *See* Resp. Br. 40 n.21.

What both the government and amici neglect to mention is that the Advisory Committee expressly considered and rejected the view of these commentators and model codes, opting instead for "a system of class exceptions" drawn from the common law. Advisory Committee Note to Article VIII, *supra*, 28 U.S.C. App., at 770-71 (rejecting Uniform Rule 63(1)'s approach of "admitting the hearsay declaration of a person 'who is present at the hearing and available for cross-examination,'" and rejecting the views of commentators, including expressly those of the Honorable Judge Weinstein, that "[a]dmissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence").[10] The Advisory Committee could not have been more explicit in rejecting the commentators' views on which the government relies.[11] The Committee

[10] The government's amici claim that the Advisory Committee Note to Rule 801(d)(1)(B) discusses how a prior statement is "nearer in time" and therefore more likely to be true. Amicus Br. 8. The quoted language, however, comes from the Advisory Committee Note, 28 U.S.C. App., at 773, pertaining to admission of prior *inconsistent* statements under Rule 801(d)(1)(A).

[11] With reference to Rule 801(d)(1), the drafters noted the views of commentators but observed:

> The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as sub-

evinced its reliance on the common law "system of class exceptions" in crafting Rule 801(d)(1)(B), referring specifically to Rule 801(d)(1)(B) as enumerating one of "three situations" in which a prior consistent statement "is excepted from the category of hearsay." Advisory Committee Note, 28 U.S.C. App., at 773.[12] Finally, the drafters made it plain that Rule 801(d)(1)(B) embodies the traditional common law rule by explaining the rule thusly: "Prior consistent statements *traditionally* have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence." *Id.* (emphasis added).

The principle on which the government rests much of its argument, *i.e.*, that the presence of a declarant as a witness is sufficient to guard against abuse, was rejected in fashioning Rule (801)(d)(1). Judge Weinstein states that the Advisory Committee, in its first unpublished draft of Rule 801, took the position of the Uniform and Model rules "that the trier of fact would have an adequate basis

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> stantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.
>
> The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence.

Advisory Committee Notes, 28 U.S.C. App., at 773.

[12] The government hypothesizes that the drafters of Rule 801(d)(1)(B) were crafting a "version of the 'Best Evidence' rule." Resp. Br. 44 n.23. However, the drafters expressly rejected a theory of hearsay where "admissibility would be determined by weighing the probative force of the evidence against . . . the availability of more satisfactory evidence," Advisory Committee Note to Article VIII, *supra*, 28 U.S.C. App., at 771, and instead stated that Rule 801(d)(1)(B) was based on a "judgment [that] is one more of experience than of logic." Advisory Committee Note, 28 U.S.C. App., at 773. Moreover, the government's hypothesis, were it true, fails to undermine the pre-motive rule. A prior consistent statement is not "better evidence" than the in-court testimony of a declarant unless, of course, the prior consistent statement was made *before* the facts relied upon to show improper motive.

for testing the credibility of a declarant who also appears as a witness." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 801(d)(1)[01], at 801-132 (1993). "However, this original formulation led to objections by attorneys who feared that the rule would be abused, and the final version of Rule 801, as promulgated by the Supreme Court, limited the situations in which prior statements of a witness would be given substantive effect to the three categories now set forth in subparagraphs (A), (B) and (C) of Rule 801(d)(1)." *Id.* It is therefore incongruous to suppose, as the government argues, that the Advisory Committee, this Court, and Congress intended an express or implied charge of recent fabrication or improper motive to open the floodgates to the admission by the opposing side of any and all of declarants' prior consistent statements, whether or not made prior to the facts alleged in support of such charged improper motive.[13] Contrary to the government's contentions, Resp. Br. 31, an opportunity to cross-examine the declarant does not offset the dangers that statements will be manufactured or that cases will be decided largely on evidence less reliable than the declarant's in-court testimony."[14] That danger is particularly severe in a case, such as the one

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[13] *Cf.* 4 D. Louisell & C. Mueller, *supra*, § 240, at 187 (1980) ("Rule 801(d)(1)(B) does not authorize the general use of any and all prior statements . . . and the underlying reason seems to be mainly a fear that unlimited substantive use of prior statements would encourage (even press) lawyers to collect and later to offer such statements, leading in turn to decisions based upon evidence less reliable than live testimony").

[14] In this case, for example, A.T. was allegedly abused about June 1989. Her first statement about the abuse was alleged to have been made in August 1990. Petitioner's trial took place in February and March, 1992. On cross-examination, A.T. either denied or testified that she did not remember her prior statements. *See* Pet. Br. 5; Tr. 145, 152-53. Even under the best of circumstances, cross-examination of a witness concerning her motivation for making statements eighteen months before trial about events that allegedly occurred yet another fourteen months earlier posed a herculean task.

at bar, involving weak testimony by the declarant followed by numerous prior consistent statements which form the heart of the prosecution's case.[15]

The established common law rule, in the shadow of which Congress legislated, was that even where the declarant was a witness, testimony as to the declarant's out-of-court consistent statements could not be admitted to corroborate the declarant's testimony.[16] Had Congress or the Advisory Committee intended that this rule be discarded upon an express or implied charge of improper motive, and that any prior consistent statements relative to corroborating the witness's testimony be introduced, they would have so stated.[17] The conclusion that Rule 801(d)(1)(B) incorporates the "prior-in-time" or pre-motive common law rule is further supported by most

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[15] No sound argument for harmless error can be advanced in this case. Individually and cumulatively, the erroneous admission of the seven prior statements was extremely prejudicial. Moreover, the district court relied solely on Rule 801(d)(1)(B) in admitting A.T.'s August 27, 1990, statement to Rocha, to which Padilla also testified, rejecting the government's contention that Rocha's testimony was also admissible under Fed. R. Evid. 803(24). Rocha's testimony about that statement was highly inculpatory and greatly exceeded the scope of A.T.'s testimony.

[16] *See, e.g., People* v. *Clark*, *supra*, 288 N.E.2d at 371 ("witness may not testify as to statements he gave out of court for the purpose of corroborating his testimony given at the trial").

[17] The government wrongly claims that Rule 801(d)(1)(B)'s expanded *use* of prior consistent statements demonstrates that the drafters intended to reject "traditional common law conceptions of hearsay evidence." Resp. Br. 44-45. Where the traditional standard was being altered, the framers said so; both the language of the Rule ("A statement is not hearsay if . . .") and the accompanying Advisory Committee Note, 28 U.S.C. App., at 773, specifically recognize that substantive use of prior consistent statements was disallowed at common law. There is no credible reason to assume from a single express change to the traditional use of prior consistent statements that Rule 801(d)(1)(B) constitutes a *sub silencio* rejection of the common law standard of *admissibility* of prior consistent statements.

commentators, including Professor Cleary, the Reporter for the Advisory Committee.[18]

3. There is also little merit to the government's argument that in the "decade preceding the adoption of the Federal Rules of Evidence," the clarity of the common law pre-motive rule was muddied as federal courts of appeal became influenced by commentators. Resp. Br. 41-43. The government cites five cases in support of this claim. Two concern the admissibility of prior consistent statements to *explain* prior *inconsistent* statements and, hence, are inapposite.[19] Two cases are consistent with the pre-motive rule.[20] One of these, *United States* v. *Zito*,

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[18] *See e.g.*, E. Cleary, *McCormick on Evidence* § 251, at 747 (3d ed. 1984) (summarizing the intended application of Rule 801(d)(1)(B)); 1 *McCormick on Evidence*, *supra*, § 47, at 177 ("prior consistent statement has no relevancy to refute the charge unless . . . made *before* the source of the bias . . . . The above results should ordinarily be reached under the Federal Rules of Evidence") (citations omitted); 4 D. Louisell & C. Mueller, *supra*, § 420, at 187 (under the Rule, prior statement "must specifically tend to rebut a charge . . . of 'recent fabrication or improper influence or motive'"); *id.* at 193 ("by traditional learning . . . statements [are] relevant only if they were uttered before such corrupting forces came into play. Theoretically, this idea is sound, and most modern authority applying Rule 801(d)(1)(B) agrees") (citations omitted); *but see* 4 J. Weinstein & M. Berger, *supra*, § 801(d)(1)(B)[01], art 801-196 (stating that "[a]lthough the Advisory Committee's note does not specifically address this issue, a number of circuits have read into Rule 801(d)(1)(B) a requirement that the prior consistent statement must have been made before the declarant had a motive to fabricate his story").

[19] In *Hanger* v. *United States*, 398 F.2d 91 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969), the Eighth Circuit held that in the context of responding to prior *inconsistent* statements, there should not be a rule "that prior consistent statements must have been made prior to the impeaching statements . . . ." *Id.* at 104. But the court recognized that when "testimony is assailed as a fabrication," the pre-motive rule applies. *Id.* at 103. Similarly, in *Copes* v. *United States*, 345 F.2d 723 (D.C. Cir. 1964), the court held that a prior consistent statement need not precede a prior inconsistent statement to be admissible.

[20] *See United States* v. *Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972) (holding admissible statements made prior to events allegedly

even cites Proposed Federal Rules of Evidence, Rule 801(d)(1)(B) (submitted to the Supreme Court in November 1971) as embodying "the *usual rule* that prior consistent statements can only be introduced after a charge that a witness's story is a recent fabrication and where the statements were made *before* any motive to fabricate developed." 467 F.2d at 1403-1404 (emphasis added). The final case does adopt the probative-weight analysis favored by the government in the fabrication context,[21] but this case comes from the Fifth Circuit, one of the few, if not the only, federal circuits clearly to depart from the majority common law rule prior to adoption of the Federal Rules.[22] *See* 4 J. Weinstein & M. Berger, *supra*, § 801(d)(1)(B), at 801-196 n.13, 801-198 n.14.[23]

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supporting charge of fabrication); *United States* v. *Bays*, 448 F.2d 977 (5th Cir. 1971), *cert. denied*, 405 U.S. 957 (1972) (holding admissible statement made *after* arrest but *before* conviction). The holding in *Bays* is consistent with courts that adopt the pre-motive rule and hold that where multiple motives are asserted, "a prior consistent statement is admissible if it was made before the existence of any one or more of the biases or motives that, according to the opposing party's express or implied charge, may have influenced the witnesses' testimony." *People* v. *Hays*, 802 P.2d 376, 395 (Cal. 1990), *cert. denied*, 112 S.Ct. 420 (1991).

[21] *See United States* v. *Gandy*, 469 F.2d 1134 (5th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973).

[22] The substantive effect afforded prior consistent statements under Rule 801(d)(1)(B) makes it particularly important that trial judges exercise caution in limiting admission of prior consistent statements to those that rebut a specified charge of impeachment.

[23] The Tenth Circuit, too, relied on a case involving prior inconsistent statements, *not* a charge of improper motive. *See* J.A. 34-36, discussing *United States* v. *Miller*, 874 F.2d 1255 (9th Cir. 1989). Due to confusion surrounding prior inconsistent statements at common law and under Rule 801(d)(1)(B), *Miller* contains misguided reasoning that casts aside three prior Ninth Circuit opinions upholding the pre-motive rule. *Id.* at 1271-74, 1274 n.13, distinguishing *Breneman* v. *Kennecott Corp.*, 799 F.2d 470 (9th Cir. 1986); *United States* v. *Rohrer*, 708 F.2d 429, 433 n.4 (9th Cir. 1983); *United States* v. *Rodriguez*, 452 F.2d 1146, 1148 (9th Cir. 1972). *Cf. Graham* at 592-604 (discussing applicability of Rule 801(d)(1)(B) to prior inconsistent statement cases).

The government relies on 3 J. Weinstein & M. Berger, *supra*, § 607[08], at 607-116, for its claim that in the decade before adoption of the Rules, "several courts eschewed" mechanical application of the pre-motive rule. Resp. Br. 41. The commentators' actual statement, however, is merely that "some courts had *suggested* rejecting a mechanical application of the rule. . . ." *Id.* Even here, Weinstein and Berger fail to specify whether they are discussing the admission of prior consistent statements to explain or deny prior inconsistent statements, or to rebut charges of recent fabrication, or both. *Id.* In fact, a later comment in the same treatise suggests a focus on prior inconsistent statement cases, not fabrication cases.[24] Commentators who have not confused the two lines of cases have concluded that the common law rule where "an impeaching effort . . . does suggest fabrication, influence, or motive" is the pre-motive rule, and that this is also the better interpretation of Rule 801(d)(1)(B) in the fabrication or improper motive context. 4 Louisell & Mueller, *supra*, § 47, at 177; *see also* Annotation, *supra*, 75 A.L.R.2d at 930-46 (discussing "Impeachment by inconsistent statements" separately from "Impeachment on ground of bias, interest, recent fabrication, or motive to falsify"); *id.* at 920 (concluding that pre-motive rule is the "universal rule").

The pre-motive rule has endured because of the power of the insight that a prior consistent statement "has no relevancy to refute the charge [of fabrication] unless the consistent statement was made *before* the source of the bias, interest, influence or incapacity originated." 1 *Mc-*

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[24] *See id.* § 801(d)(1)(B)[01], at 801-200 ("As the discussion in § 607[08], *supra*, indicates, the federal decisions prior to the Rules were rather flexible in admitting prior consistent statements for rehabilitative use. Instead of insisting that the consistent statement have been made prior in time to *the inconsistent statement*, they admitted the consistent statement where under the circumstances of the case it would aid the jury in determining whether the witness was telling the truth") (emphasis added).

Cormick on Evidence, supra, § 47, at 177. The government cannot obscure the clarity and near universal acceptance of the pre-motive rule by referencing inapposite *inconsistent* statement cases. When the Advisory Committee crafted Rule 801(d)(1)(B) to incorporate the rule "traditionally" applicable to the admission of a "prior consistent statement" to "rebut charges of recent fabrication or improper influence or motive," Advisory Committee Note, 28 U.S.C. App., at 773, the traditional rule was the pre-motive rule.

C. The "Probative Weight" Test Collapses The Requirements Of Rule 801(d)(1)(B) Into Relevancy Rules 402 And 403, And Eviscerates The Trustworthiness Requirements Of Rule 803(24) And The Hearsay Rules Generally.

The government's and Tenth Circuit's standard of "probative force apart from mere repetition," J.A. 37, ignores the specific requirements of Rule 801(d)(1)(B) and the intention behind Article VIII to retain the common law "system of class exceptions." Advisory Committee Note to Article VIII, *supra*, 28 U.S.C. App., at 771. Under the government's and Tenth Circuit's standard, the Rule 801(d)(1)(B) rebuttal requirement is reduced to a hollow formality, and admissibility becomes purely a matter of relevancy under Rules 401-403.[25]

Adoption of the "probative weight" theory would eviscerate the effort made in Article VIII, particularly Rule 803, to ensure that only trustworthy out-of-court statements are admitted. Merely upon a finding that *some* indicia of trustworthiness (such as spontaneity) exist, the out-of-court statement is deemed to have "probative force apart from mere repetition," J.A. 37, and comes

[25] For example, the government concludes that a prior consistent statement "that has nothing to do with the charged motive" would be inadmissible not because it fails to meet the rebuttal requirement of Rule 801(d)(1)(B), but only because it would not pass muster under Rule 402. Resp. Br. 18 n.8. Similarly, the government maintains that A.T.'s statements to the prosecutor just before trial would be inadmissible only for lack of relevance under Rule 401. Resp. Br. 30.

in as substantive evidence. This standard is significantly more lax than those embodied in Rule 803, particularly the "catch-all" hearsay exception in Rule 803(24). *See* Pet. Br. 27-28. Indeed, the Tenth Circuit relied on its Rule 801(d)(1)(B) findings to admit the seven prior statements and never reached the thorny issue of whether those statements were admissible under Rule 803(24). J.A. 27.

II. THE POLICY ARGUMENTS OF THE GOVERNMENT AND AMICI CANNOT OVERRIDE THE INTENT OF CONGRESS AND ARE, MOREOVER, UNFOUNDED.

The government and amici lard their briefs with policy arguments that holding that Rule 801(d)(1)(B) embodies the pre-motive rule—the majority common law rule *in use for over a century*—will lead to disaster in particular kinds of cases. First, such arguments are unavailing in the face of Congress's intention to continue the traditional common law rule. Even if such arguments were true, "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *United States* v. *Salerno*, 112 S.Ct. 2503, 2507 (1992). Furthermore, the fact that the pre-motive rule has been the majority rule for a century reveals the exaggerated quality of such arguments and, indeed, there is no merit to them.

For example, the government worries unnecessarily that courts will exclude prior statements of accomplices whenever a defendant suggests that an accomplice knew from the very early stages of investigation that he might receive a deal. But the mere fact that an accomplice has been arrested does not imbue him with an improper motive. *See United States* v. *Montague*, 958 F.2d 1094, 1100 (D.C. Cir. 1992) (Wald, J., concurring in result and dissenting as to rationale) (holding such statements admissible under the pre-motive rule); E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B)*, 1987 B.Y.U.L.R. 231 n.69 (same).

The government's amici raise the alarm that the defense will block admission of child victims' prior consistent statements by ascribing to the victims defense-concocted motives to fabricate. St. Amicus Br. 21. The danger is illusory. It is the charge of fabrication that *permits* admission of the statements at all *unless*, of course, the statements are admissible under other Rules (such as Rules 106, 613, 803 and 804) or for the purpose of *explaining* or *denying* inconsistent prior statements, in which case they are admissible regardless of the charge of fabrication. *See United States* v. *Payne*, 944 F.2d 1458, 1471 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1598 (1992) (admitting prior consistent statements drawn from same reports as prior inconsistent statements). Hence, the impact of the pre-motive rule is narrower than the government and amici suggest.

The government complains that if this Court confirms Rule 801(d)(1)(B)'s rebuttal requirement, trial courts will be called upon to make impossible determinations concerning when particular motives arose.[26] Resp. Br. 24-25. In fact, the great majority of federal and state courts have applied the pre-motive rule for over a century without undue difficulty. *See, e.g.*, G. Joseph & S. Saltzburg, *The Federal Rules in the States*, Chapter 56 (Rule 801) at 11 (Michie Co. 1987) (state courts "overwhelmingly impose" the pre-motive rule). In the final analysis, the government and amici simply disagree with Congress's, the Advisory Committee's and this Court's determination to incorporate in Rule 801(d)(1)(B) the traditional common law rule.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

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[26] In this case, A.T. proclaimed the existence of the charged motive before making her first allegation of abuse ("Please don't let my mom take my [sic] back to my father. . . . Because I don't want to go back." J.A. 11-12.). The government does not dispute that A.T.'s motive to remain with her mother was well-developed at the time of her prior consistent statements.

Respectfully submitted,

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